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# CLASSIFICATION OF RIGHTS AND WRONGS.

MORE than twelve years ago, the writer published in this REVIEW,[1] by way of introduction to a series of articles on equity jurisdiction, a classification of those rights which it is the duty of courts of justice to protect and enforce, and also of the wrongs by which such rights may be infringed. The views then stated, having only recently been adopted by the writer, were comparatively crude and undeveloped. Since that date, however, he has given considerable attention to the classification of rights and wrongs, and has made his views upon that subject the basis of an elementary course of instruction on equity jurisdiction; and the result has been that his views of twelve years ago have undergone some modification and much development. It has occurred to him, therefore, that a re-statement of the views now held by him might not be out of place, especially as some of his former pupils, now engaged in teaching, have done him the honor to make some use of his former observations in their own teaching.

As those rights which it is the duty of courts of justice to protect and enforce include equitable as well as legal rights, and as each of these classes of rights requires separate treatment, it will be convenient to begin with legal rights.

Legal rights are either absolute or relative. An absolute right

[1] Vol. 1, p. 55.

is one which does not imply any correlative obligation or duty. A relative right is one which does imply a correlative obligation or duty.[1]

Absolute rights are either personal rights or rights of property. A personal right is one which belongs to every natural person as such. A right of property is one which consists of ownership or dominion (*dominium*).

Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce, nor have they any pecuniary value. For the same reasons, courts of justice never have occasion to take cognizance of them except when complaints are made of their infringement; and even then the only question of law that can be raised respecting them is whether or not they have been infringed. It follows, therefore, that all the knowledge that we have of personal rights relates to the one question, what acts will constitute an infringement of them. We can neither number them nor define them, and any attempt to do either will be profitless. There is, however, one personal right which differs so widely from most others that it deserves to be mentioned, namely, the equal right of all persons to use public highways, navigable waters, and the high seas.

In all the foregoing particulars, rights of property are the very converse of personal rights. All such rights are acquired, and they may all be alienated. They are all, therefore, the subjects of commerce, and they all have, or are supposed to have, a pecuniary value. For the same reasons, courts of justice take cognizance of them for a great variety of purposes, and they are all capable of being enumerated and defined.

Rights of property are said to be either corporeal or incorporeal. In truth, however, all rights are incorporeal; and what is meant is that the subjects of rights of property (*i. e.*, things owned) are either corporeal or incorporeal. A thing owned is corporeal when it consists of some portion of the material world, and incorporeal when it does not.

A single material thing may be owned by several persons, and

[1] Writers upon jurisprudence generally use the terms *in rem* and *in personam* to mark the primary division of legal rights, and it is, therefore, proper for me to explain why I use the terms "absolute" and "relative" instead. It will, however, be more convenient to do this after treating of the different classes of legal rights. See *infra*, p. 246, n.

that too without any division of it, either actual or supposed, each person owning an undivided share of it; and in that case each owner has a right of property just as absolute as if he were the sole owner of the thing. In case of land also, the ownership, instead of being divided into shares, may be divided among several persons in respect to the time of their enjoyment, one of them having the right of immediate enjoyment, and the others having respectively successive rights of future enjoyment. This peculiarity in the ownership of land comes from the feudal system. Land itself is also peculiar in this, namely, that a physical division of it among different owners is impossible; and hence the land of A, for example, is separated from the adjoining land only by a mathematical line described upon the surface, A's ownership extending to the centre of the earth in one direction, and indefinitely in the other direction. By our law, land is also capable of an imaginary division, for the purposes of ownership, laterally as well as vertically; for one person may own the surface of the land, and another may own all the minerals which the land contains. Such a mode of dividing the ownership of land certainly creates many legal difficulties, but it seems to be persisted in notwithstanding, at least in England.[1] In like manner, by our law, a building is capable of an imaginary division, for purposes of ownership, both lateral and vertical.[2]

Relative rights are either obligations or duties. Strictly, indeed, "obligation" or "duty" is the name of the thing with which a relative right correlates; but such is the poverty of language that we have to use the same word also to express the right itself.

An obligation is either personal or real, according as the obligor is a person or a thing. An obligation may be imposed upon a person either by his own act, *i. e.*, by contract (*obligatio ex contractu*), or by act of law (*obligatio ex lege*, or *obligatio quasi ex contractu*).

An obligation may be imposed upon a thing either by the law alone, or by the law acting concurrently with the will of the owner of the thing. In the latter case, the will of the owner must be manifested in such manner as the law requires or sanctions. By our law, it is sometimes sufficient for the owner of a thing to impose an obligation upon himself, the law treating that as sufficient evidence of an intention to impose it upon the thing also, — when, for example, the owner of land enters into a covenant respecting

[1] Humphries *v.* Brogden, 12 Q. B. 739, 755.

[2] Idem, 756–757.

it, and the covenant is said to run with the land. The most common way, however, in which an owner of land manifests his will to impose an obligation upon it is by making a grant to the intended obligee of the right against the land which he wishes to confer, *i. e.*, he adopts the same form as when he wishes to transfer the title to the land. If, however, an owner of land, upon transferring the title to it, wishes to impose upon it an obligation in his own favor, he does this by means of a reservation, *i. e.*, by inserting in the instrument of transfer a clause by which he reserves to himself the right which he wishes to retain against the land. An owner of a movable thing imposes an obligation upon it by delivering the possession of it to the intended obligee, declaring the purpose for which he does it, as when a debtor delivers securities to his creditor by way of pledge to secure the payment of the debt.

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist,[1] but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitutes* (*i. e.*, states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, *i. e.*, the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *à prendre*. The latter included the *pignus* and the *hypotheca*, *i. e.*, the Roman mortgage, — which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mort-

[1] See 10 HARV. LAW REV. 72.

gaged was indispensable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I. c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizor respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

There are also in our law other instances of what the Romans would have called personal servitudes, if they had existed in their law; for example, easements and profits in gross,[1] *i. e.*, easements and profits which exist for the benefit of their owner generally, — not for the exclusive benefit of some particular estate belonging to him. Rents and tithes seem also to fall into the same category.[2]

Passing from obligations to duties, the first thing to be observed is that the latter are either public or private, according as they are imposed for the benefit of individuals as such, or for the benefit of the public, or of some portion of the public.

Duties have attracted very little notice either from courts or from legal writers. There has, indeed, been a general failure, as well in our law as in the Roman law,[3] and also among writers on jurisprudence,[4] to discriminate between obligations and duties; and yet the distinctions between them are many and important. All duties originate in commands of the State; while all obligations originate either in a contract between the parties, or in something which has been done or has happened to the gain of the one and the loss of the other, and under such circumstances as make it unjust for the one to retain the gain or the other to suffer the loss. It is true that every obligation (being a *vinculum juris*) has in it a legal element, and that those obligations which do not originate in contract are pure creatures of the law: yet, in creating obligations, the only object of the State is to see that all persons within its jurisdiction act justly towards others, while, in imposing duties, it acts from motives of policy, or at least it imposes them as a part of the system of law which it adopts, and without reference to any particular case or any particular persons. Moreover, in creating obligations, the State acts in each particular case, and only after the events have happened which render its action necessary, and in each case its action has reference solely to the parties between whom the obligation is created, while, in imposing duties, the State issues its command once for all, and

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[1] See Gale on Easements, Part 1, c. 1, s. 4 (Part 1, c. 2, s. 4 of the 6th and 7th eds.).

[2] See 10 HARV. LAW REV. 78 *et seq.*

[3] Thus, in Justinian's Institutes, *L.* 3, *Tit.* 27, six instances are given of what are called *obligationes quasi ex contractu* (namely, *negotiorum gestorum*, *tutelæ*, *communi dividundo*, *familiæ erciscundæ*, *ex testamento*, *solutio non debiti*), only the first and last of which seem in truth to belong to that category, the other four being instances of duties.

[4] See Holland, Jurisprudence, Part 2, c. 12, in which obligations are declared to embrace all rights *in personam* (*i. e.*, all relative rights), and in which obligations and duties are treated of indiscriminately.

the command always precedes the duty. In creating obligations, the State acts generally through its courts of justice, while, in imposing duties, it acts directly or indirectly through its legislature, *i. e.*, duties are imposed by positive laws. In short, the necessity for creating an obligation is established by *a posteriori* reasoning, while the necessity for imposing a duty is established by *a priori* reasoning. To an obligation there must always be two parties or sets of parties, and neither of them can ever be changed except by authority of law. Of duties, on the other hand, parties cannot properly be predicated, as duties are imposed, not upon identified persons, but upon persons in certain situations, or occupying certain positions, and they are imposed also in favor of persons in certain situations, or occupying certain positions, and, therefore, the person who is to perform a given duty, as well as the person in whose favor it is to be performed, is liable to constant change.

The cases in which duties are imposed, especially by modern statutes, are numberless, and any attempt to enumerate or classify them would be futile.[1] There are, however, many duties, most of which are imposed by ancient statutes, or by rules of the common law or the canon law which have the force of statutes, — which are well known, and some of which it may be well to mention. Probably the most ancient instance to be found is the duty imposed upon an executor to pay legacies. It was originally imposed by the Roman law upon the predecessor of our executor, namely, the heir appointed by the will of a deceased person; but when the Roman empire became Christian, and the Church at

[1] In Couch *v.* Steel, 3 El. & Bl. 402, it was held that the statute of 7 & 8 Vict. c. 112, s. 18, makes it the duty of a ship-owner to keep on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages; that the duty is both public and private; that for a breach of that duty the only remedy of the public was the penalty provided by the Act, the common-law remedy by indictment being by implication taken away; but that a seaman, serving on board a ship at the time of the breach, was entitled to the common-law remedy of an action on the case, notwithstanding the penalty.

By The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), after a railway company has given to a land-owner a notice that it will require his land for the purposes of its line, in accordance with s. 18 of the Act, the duty is imposed upon the company of taking the proceedings provided for by the Act for acquiring the land and paying the purchase-money. See Haynes *v.* Haynes, 1 Dr. & Sm. 426, and cases there cited.

The decision in the celebrated case of Ashby *v.* White, 2 Ld. Raym. 938, 1 Smith's L. C. (2d ed.) 105, involved two propositions, namely, first, that the plaintiff, being a burgess of the borough of Aylesbury, was entitled as such to vote for two burgesses to represent that borough in the House of Commons; secondly, that the duty was imposed upon the defendants, at an election held for electing such burgesses, of receiving and counting the votes of the electors, and that for a breach of that duty the plaintiff was entitled to maintain an action on the case.

length obtained exclusive jurisdiction over the estates of deceased persons, it was by a law of the Church that the duty was imposed. This duty constitutes the only legal means of compelling an executor to pay legacies, as the assets out of which they are to be paid vest in him absolutely, both at law and in equity. A closely analogous duty is that imposed by the Statute of Distributions [1] upon administrators of the estates of intestates to divide the estate among the intestate's next of kin. Another ancient duty (which, however, no longer exists in English-speaking countries) was the duty imposed by the canon law upon every tithe-payer to set out the tithes payable by him, *i. e.*, to sever the tenth part from the other nine parts, and to set apart the former for the tithe-owner. It was by means of this duty alone that payment of tithes could be enforced; for, until tithes were set out, the title to the entire produce of the land was vested in the tithe-payer, but, when the tithes were set out, the title to the tenth part vested in the tithe-owner, who had accordingly, in respect to it, the same common-law remedies as any other owner of chattels. Another ancient instance is the duty imposed by the common law upon the heir of a deceased person to assign dower to the widow of the latter. Here, again, the enforcement of this duty was the widow's only resource, as the title to all the land of which her husband died seized vested in the heir, both at law and in equity. Another very numerous class of duties consists of those which are imposed upon all persons who travel upon public highways, or upon navigable waters (including the high seas), with respect to other persons with whom they come in contact. It is upon these duties that the rights of such persons as against each other wholly depend. Other instances will be found in the well-known duties imposed by the common law upon common carriers and innkeepers, not only towards the employers of the one and the guests of the other, but also towards all those who desire to employ the one or to become the guests of the other; also in the duty imposed by the common law upon professional men, and upon others whose callings require the exercise of special skill, to exercise reasonable skill on behalf of all those by or for whom they are employed. In the cases mentioned in the last sentence, there may, indeed, be a liability on contract; but, on the other hand, in many of those cases there may either be no contract, or none that can be proved, while the duty is always available, and never involves any difficulty as to proof.

[1] 22 & 23 Car. II. c. 10.

Domestic or family relations give rise to a numerous class of duties, but most of them are moral rather than legal, or, at all events, are not such as any court of justice will enforce, and do not, therefore, come within the scope of this article.

Another very numerous and important class of cases consists of those in which duties are imposed upon joint-stock corporations towards their shareholders, and also towards those who establish a right to become holders of their shares. As a rule, these duties furnish the only means by which these two classes of persons can enforce their rights against the corporation. There may be exceptions to this rule, and one exception certainly is where a dividend has been declared (and the declaration of a dividend is the performance of a duty); for then the amount payable to each shareholder becomes a debt, and so, of course, an obligation.

The class of cases, however, in which an alleged breach of duty becomes more frequently the subject of litigation than in all other cases put together, is that in which the duty imposed is to exercise care and diligence to secure the safety of others, or to avoid being the cause of personal harm to others. Such a duty is imposed upon all persons to whom the personal safety of others is largely intrusted, and especially upon all carriers of passengers. A similar duty is also imposed upon all persons whose occupation involves special danger to the public, for example, upon railway companies, or who do or permit to be done, or keep or permit to be kept, upon their own land, what is fraught with a like danger. A breach of this duty is negligence, and whether such breach has been committed is the question to be tried in what is by far the most numerous class of litigated cases with which courts of justice are troubled. Negligence may, indeed, be a breach of contract, and it may also be one of the elements of an affirmative tort, namely, where one person by an affirmative act unintentionally causes harm to another, but might have avoided doing so by the exercise of reasonable care. It would not, however, be too much to say that, in ninety-nine out of every hundred of the reported cases involving a question of negligence, the alleged negligence was a breach of duty.

We are now prepared to inquire why it is that duties have attracted so little attention. Some of the reasons certainly are not far to seek. In several particulars, duties bear a striking resemblance to personal rights. The latter are pure creatures of the law, and are not in the least dependent upon the will or the action of the person to whom they belong. The former also are pure creatures

of the law, and are not directly (though they may be indirectly) dependent upon the will or the action either of the person upon whom the burden of them is imposed, or of the person entitled to have them performed. Personal rights accompany their owner from his birth to his death; and while that is not true of duties, yet it is true of every duty that it is a mere legal incident of certain situations, that a person can avoid incurring liability to a duty only by avoiding the situation to which such liability is incident (as he can free himself from a duty, to which he has once incurred liability, only by ceasing to occupy the situation to which such liability is incident); and that a person can acquire a right to the performance of a duty only by placing himself in a situation to which such right is incident, and will lose the right whenever he ceases to occupy that situation. A personal right can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value; and so also the right to have a duty performed can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value, except indirectly, as stated above. As courts of justice can have no occasion to take cognizance of personal rights, except when complaints are made of their infringement, so also the same thing is true of duties; and though a duty, unlike a personal right, may be easily formulated, and the question of its existence is entirely distinct from the question of its infringement, yet the former, in comparison with the latter, very seldom arises, and, even when it does arise, there is little in it to stimulate inquiry beyond the mere practical question whether the person charged was bound to do the thing the not doing of which is the alleged cause of action. If an explanation be asked of the comparative infrequency with which any question as to the existence of a duty arises, it may be answered that a duty once existing continues to exist so long as the statute which imposed it remains in force, or so long as the situation which gave rise to it continues to exist; and that, while an obligation as a rule is capable of but one performance and one breach, and, therefore, when once performed or once broken, is at an end, the same duty may be imposed upon an unlimited number of persons, and may be performed an unlimited number of times, and hence is capable of an unlimited number of breaches.[1]

[1] I now proceed to do what, in a previous note (p. 938, n.), I postponed until now, namely, to explain why I used the terms "absolute" and "relative" to mark the primary division of legal rights, instead of the terms *in rem* and *in personam*. 1. If I had used the latter terms, I should have required them both to designate relative

Having now gone through with the different classes of legal rights, it is next to be observed that a relative right is relative only as between the person to whom the right belongs and the person who is subject to the correlative obligation or duty; and, therefore, so far as such a right concerns the rest of the world, it is an absolute right of the second class, *i. e.*, a property right. Moreover, every relative right which has, or is supposed to have, a pecuniary value, does or may concern the rest of the world. What relative rights then have, or are supposed to have, a pecuniary value? Clearly, all obligations fall within that category; and though in strictness this cannot be said of any duty, yet some duties consist, in whole or in part, in transferring money, or other things of value, to other persons, and when that is the case, and especially when the duty furnishes the only legal means of compelling such transfer, the performance of the duty certainly confers a pecuniary benefit upon the person in whose favor it is performed, and yet, prior to its performance, the only legal right vested in the latter is the right to have the duty performed. Of this description is the duty of an executor to pay legacies, of the administrator of an intestate to divide the personal estate of the latter among his next of kin, and of a tithe-payer to set out tithes.

Probably many persons will be surprised at being told that the legatees and next of kin of deceased persons have no right or interest in the estates out of which their legacies and distributive shares are respectively to be paid. Their surprise ought, however, to cease when they are further told that, by the Roman law, no

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rights, and should, therefore, have had nothing left for absolute rights; for rights *in personam* would clearly have embraced only those rights which are created by personal obligations and duties, and, therefore, I must have used the term *in rem* to designate those created by real obligations. 2. If the phrase "rights *in personam*" perfectly describes all those rights which are created by personal obligations or duties, then the phrase "rights *in rem*" perfectly describes those rights which are created by real obligations, when considered as obligations; and, if so, it is clearly impossible that it should also correctly describe absolute rights. 3. The phrase "rights *in rem*" does not, in fact, describe correctly either class of absolute rights. It might, indeed, be used, without any great impropriety, to describe ownership of corporeal things, but to use it to describe ownership of incorporeal things is certainly taking great liberties with language, and to use it to describe personal rights seems to me to be in the highest degree absurd. 4. The terms *in rem* and *in personam* are properly applicable to procedure only, and the use of them was limited to procedure by the Romans. 5. The terms "absolute" and "relative," as used by me, require neither explanation nor justification, while the terms *in rem* and *in personam*, if used for the same purpose, would have required both. 6. The terms *in rem* and *in personam*, as applied to rights, are wholly foreign, while, in using the terms "absolute" and "relative" instead, I follow the example of Blackstone.

one could directly dispose of any part of his estate by will; that when a person died, whether testate or intestate, his entire estate vested absolutely and by operation of law in his heir, namely, in his *hæres natus* if he died intestate, and in his *hæres factus* if he died testate; that property could be given by will only in the form of legacies, and that legacies could be given only indirectly, namely, by directing the heir to pay them; and, lastly, that our executor and administrator have respectively succeeded, as to personal estate, to the situation of the *hæres factus* and *hæres natus* of the Romans. Hence it is that, while the real estate of a deceased person passes, upon his death, directly to his heir, no one can acquire any interest in his personal estate except through his executor or administrator, *i. e.*, through the performance of a duty imposed upon the latter.

It follows from what has been said that all obligations, whether personal or real, and also such duties as have just been described, have two aspects, *i. e.*, they are to be regarded as relative rights, or as absolute rights, according to the point of view from which they are looked at, but with this difference, that, while personal obligations and duties are chiefly to be regarded as relative rights, real obligations are chiefly to be regarded as absolute rights.

It is now necessary to return to the subject of incorporeal things which may be owned, — of which it has thus far only been said that they constitute no part of the material world, and that is no more than saying that they are incorporeal.

Ownership of corporeal things is merely the result of appropriation by individuals to themselves, with the sanction of the law, of portions of the material world; *i. e.*, all material things exist in nature, though their form and appearance may be indefinitely changed, and their value in consequence indefinitely increased or diminished. All that can be done, therefore, respecting them by human will or human action, is to change their form and appearance, and to make them the subjects of individual ownership. Those incorporeal things, however, which may be owned, have no existence in nature, and are all, therefore, of human creation. Moreover, they are all created either by the State alone, or by private persons with the authority of the State. A private person can create incorporeal ownership either against himself or against things belonging to him. He does the former whenever he incurs a personal obligation, *i. e.*, he creates in the obligee a relative right as between the latter and himself, and an absolute right as between the obligee and the rest of the world. So, too, a private person

creates an absolute right against himself when he grants an annuity, and in that case there is no relative right. A private person creates an incorporeal property right against a thing whenever he creates a real obligation, *i. e.*, imposes an obligation upon a thing belonging to him; for, though the right thus created is relative as between the obligee and the thing upon which the obligation is imposed, yet it is also absolute, not only as to all persons other than the owner of the thing, but even as to him. In case of some duties, also, a private person may contribute to the creation of incorporeal ownership, not against himself personally, nor against things belonging to him, but against another person, though in respect of things belonging to himself, as when a testator directs his executor to pay legacies to certain persons out of his personal estate, or to sell certain land and pay the proceeds to persons named, the land not being devised to the executor, but left to descend to the testator's heir; for in each of these cases the law makes it the duty of the executor to do as the testator has directed, and this duty the beneficiaries can compel him to perform; and this right in the beneficiaries is incorporeal property.

Another important class of cases in which a private person may create incorporeal ownership, is where an owner of things grants to another person an authority to transfer the title to them, or to use and enjoy them. In the first of these cases, the authority is technically called a power, and the acts authorized to be done would, without such authority, be inoperative and void. In the second case, the authority is commonly called a license, and the acts authorized to be done would, without such authority, be tortious. The grantor of a power may limit the persons in whose favor it may be exercised (not including the grantee), or he may authorize its exercise for the grantee's own benefit. In the former case, the grantee of the power is not entitled to receive any pecuniary benefit from its exercise, while, in the latter case, the power is practically equal to ownership of the things over which it extends. In point of law, however, it is, in each case, incorporeal property, *i. e.*, it is no less than that in the first case, and no more in the second. In the first case, the exercise of the power may be discretionary or mandatory, and, if mandatory, its exercise will be a duty.

A license is commonly granted for the benefit of the licensee, and in that case the right granted differs practically from ownership only in being less extensive. It may, indeed, differ practically from ownership only in not being exclusive; but a grant by

the owner of a thing of all his rights as such owner will be a grant of the ownership itself, though in terms a license only be granted. A good illustration of a license will be found in the grant of a right to work a patent for a new invention, neither the patent itself, nor any part of it, being granted. This is an instance, moreover, of a license in which the thing to be enjoyed, as well as the right to use and enjoy it, constitutes incorporeal property. Another good illustration will be found in a grant by an owner of land of the right to dig in his land for minerals, and to appropriate to the grantee's own use all the minerals dug and carried away by him. Care must be taken, however, not to confound this case with that of a grant by an owner of land of all the minerals under the land, the latter being, as has been seen, a grant of corporeal property.[1]

Another instance of incorporeal ownership created by private persons is where a right is created which depends upon the happening of a condition. Thus, if A incur an obligation to B to pay him $100 on the happening of some uncertain event, the obligation does not come into existence until the event happens, and yet B has a fixed right to be paid $100 by A in case the event happens. So, if A give B a legacy of $100 in the event of B's attaining the age of twenty-one years, the gift will not take effect during B's infancy, but yet he will have a fixed right to have the legacy paid to him by A's executor, in case he attains the age of twenty-one years. So, if A give land to B, but declare that, if B die without issue then living, the land shall go to C, C will have nothing in the land during B's life, but yet he will have a fixed right, by virtue of which the ownership of the land will vest in him on the happening of the event named.

There is still another kind of incorporeal property, created by private persons, which is very different from any hitherto mentioned, namely, the property which an author, musical composer, or artist has in his literary, musical, or artistic creations. This is not a right conferred upon one person by another against himself, or against things belonging to him; nor is it a right against any person or any thing, nor is it dependent upon any person or any thing; but it is property which has a more independent existence than any corporeal thing whatever, — which a person, by his own intellectual labor, creates in himself out of nothing. It consists, not in the ideas expressed (which cannot be the subject of owner-

[1] See *supra*, p. 539.

ship), but in the expression of them, *i. e.*, in the case of an author or musical composer, it consists in the selection and arrangement of the words and signs by which the ideas are expressed, — in the case of an artist, it consists in what the artist embodies in his picture or statue.

It is, however, those classes of incorporeal property which are created by the State that attract the most attention. Blackstone[1] enumerates five of these, namely, advowsons, tithes, offices, dignities, and franchises. 1. An advowson is the right conferred by the State upon a person who has founded and endowed a church, and upon his heirs and assigns forever, of appointing the priest who is to officiate in that church. Though this right has no existence in this country, it is a very important right in England, as most of the parish churches in that country were originally founded and endowed by the lords of the manors in which they are respectively situated; and hence it is that the parson of a parish is there generally selected, not by the parishioners, but by the lord of the manor. 2. "Tithes" mean either the things received under that name, or the right to receive them, and that right is created by the State, and is incorporeal property. Like other property rights, it may be temporary or perpetual. Presumably all the tithes payable in any parish are payable to the parson of the parish for the time being, and they ought always to be payable to, or for the benefit of, either the parson of the parish, or other persons holding spiritual offices, and, if they had been, they would never have made an important figure as a species of incorporeal property. By an abuse, however, they were permitted to be alienated in fee simple, and vested in laymen; and hence they became subject to all the usual incidents of private property. 3. Most offices are not only created by the State, but the right to hold them, as well as the tenure of them, is regulated by law; and, therefore, though they are in their nature incorporeal property, yet they are without some of the most usual and important incidents of property, as they can neither be bought nor sold. They are also usually held, especially in this country, only for short periods. There is seldom, therefore, a serious controversy as to the title to an office, unless it be elective; and even then the only question which can often arise is, whether a person claiming it has been elected to it. Regarded as property, an office is peculiar in this, namely, that all the emoluments which are incident to it are conferred as a compensation for

[1] 2 Bl. Com. 21.

duties to be performed, and that no one can become entitled to receive the one without becoming bound to perform the other. The duties which the holder of an office is bound to perform may, of course, become the subject of controversy; and so, though less frequently, may the emoluments to which he is entitled. 4. When dignities exist in a State, and are held by a legal title, they also constitute a species of incorporeal property; but their existence in a State implies that the people of that State are, to some extent, ranked and graded by law; and, as that is not the case in this country, it follows that dignities have no legal existence here. 5. A franchise is defined by Blackstone[1] to be a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject, *i. e.*, by virtue of the king's grant, or by virtue of an enjoyment so long continued as to be in law equivalent to a grant. It is only in exceptional cases that the king's prerogative can thus be vested in a private person, and the fact that it can be done in those cases calls for some explanation. The explanation seems to be that certain prerogatives are vested in the king merely for the benefit of the general public. For example, the convenience of the public requires that certain services should be performed for the benefit of all persons who require their performance, and who are able and willing to pay for it; and the problem is to secure the efficient performance of such services for a fixed and reasonable compensation. One way of doing this is for the government itself to assume the performance of the service; while another way is for the government to delegate the performance of the service to private persons or corporations, making it the duty of the latter to perform the service efficiently in consideration of receiving a compensation, either fixed and agreed upon, or to be allowed by the government for the time being. Of course, it is assumed that the principle of competition is inapplicable to the case; for if it were applicable, there would be no problem to be solved, nor anything for the government to do. Moreover, it is further assumed that the very opposite principle is applicable, namely, that of monopoly; for the State must either not interfere at all, or it must assert absolute control, *i. e.*, it must either leave the needs of the public to be provided for by free and unlimited competition, or it must make it unlawful for any one to supply such needs except with the permission and under the authority of the State. Accordingly, when the State itself undertakes the performance of a service for

[1] 2 Bl. Com. 37.

the general public, it always maintains a monopoly of such service, — for example, that of carrying the mails. When, therefore, the State delegates the performance of a public service to a private person or corporation, it ought to secure to the latter a monopoly commensurate, as nearly as possible, with the duty imposed.

It is upon these principles that most franchises exist in England at the present day. First, a monopoly of a certain public service is vested in the Crown. Then the Crown by its grant delegates the performance of such service to private persons or corporations. Grants of a right to keep a fair, a market, or a ferry, are the most conspicuous instances; and every such grant carries with it by implication the exclusive right of keeping a fair, market, or ferry (as the case may be), within the district which such fair, market, or ferry is supposed to serve.

Whatever belongs to the Crown in England of course belongs to the State in this country; and when the State delegates its power, it commonly does it, not by a grant, but by law, *i. e.*, by a statute;[1] and yet such delegations of the power of the State are commonly called franchises.

Even in England, a grant from the Crown has, in modern times, been found inadequate in many cases in which the power of the State is delegated. Thus, when an ancient ferry is superseded by a bridge, and it is yet thought desirable that the bridge should be built and maintained with private capital, and that the capital thus expended should be returned in tolls, a statute is found necessary. So, when the policy was successively adopted of inviting the expenditure of private capital in building and maintaining highways, canals, and railways, a statute was always indispensable, as all such enterprises involved the compulsory taking of the land of many persons. Lastly, the needs of large cities have, within recent times, introduced several species of public service which involve an interference with public streets, and hence the right to perform such services can properly be delegated only by statute.

In this country a strong disposition has been shown to delegate the power of the State, not to particular persons or corporations selected by the legislature, but to any persons who shall voluntarily organize themselves into corporations, and comply with certain prescribed conditions. This is, of course, upon the principle of granting equal rights to all; but unfortunately the recognition of that principle has been accompanied by an abandonment of all

[1] But see *infra*, p. 554, as to patent rights.

attempt to protect from unjust and ruinous competition those who have invested their money irrevocably in providing means and facilities for serving the public. For example, when one set of men have built a railway from A to B, the State does nothing to prevent another set of men from building another railway between the same points, and as near to the former as they please.

When the State has vested in a corporation a right, for example, to take tolls in consideration of duties to be performed, as such corporation cannot transfer to any one else the burden of the duties which it has assumed, so it cannot transfer to any one else the right which was designed to furnish the means for discharging those duties efficiently. In other words, such a right is inalienable; and, therefore, it is established in England[1] that a railway company can transfer by way of mortgage only its surplus income, *i. e.*, what remains for its creditors and shareholders after payment of all its necessary expenses. Unfortunately, however, our State legislatures have lost sight of these principles, and have accordingly passed statutes authorizing railway companies to mortgage all their property and "franchises"; and hence receiverships and re-organizations of railway companies, which are entirely unknown in England, have become disastrously familiar in this country.

It has been seen that the ancient franchises of fairs, markets, and ferries, as well as many modern "statutory franchises," — for example, toll-bridges, turnpike roads, canals, and railways, — have in them an element of monopoly. There are other delegations of sovereignty, however, which are monopolies pure and simple, *i. e.*, delegations of an exclusive right to do what before was free and open to all. There are in modern times two classes of these rights, namely, patent rights and copyrights. They are peculiar, not only in the particular just stated, but also in being conferred, not in consideration of duties to be performed to the public, but in consideration of services already rendered, as well as in being conferred only for limited periods of time. A patent right is conferred by grant (in England from the Crown, in this country from the United States), though under statutory authority. A copyright is conferred directly by statute. A copyright must be sharply distinguished from the common-law right of an author, musical composer, or artist, heretofore mentioned. The latter exists only before publication, the former only after publication.

Although a copyright is in strictness of law a pure monopoly,

[1] Gardner *v.* London, Chatham and Dover Railway Co., L. R. 2 Ch. 201.

yet it ought to be regarded, not as a favor conferred, but as a partial atonement for the wrong done by the State in putting an end, upon publication, to the common-law right of an author, musical composer, or artist, in his own creation.

Having now said all that it is thought necessary to say of incorporeal things, it is next in order to inquire what rights are affirmative in their nature, and what are negative. If, however, we can ascertain what rights are negative, and why, the inquiry will be fully answered. What is a negative right? Clearly, it is a right against some person or persons, *i. e.*, a right not to have something done by him or them. By whom can such a right be given? Clearly, only by the person against whom it is given, or by some one in whose power such person is, *i. e.*, by the State. How can one person give another a negative right against himself? Only by incurring a negative personal obligation to that other. How can the State give a negative right to one person against another? It is neither easy nor necessary to specify all the possible ways in which this can be done. How does the State in fact give a negative right to one person against another? Only by giving it against all persons within the limits of its territory, or some portion of that territory, *i. e.*, by giving a monopoly or exclusive right, as already explained.

It follows, therefore, that all personal rights, all property rights, except those incorporeal rights by which the State confers a monopoly, and all relative rights, except negative personal obligations, are affirmative. If it be asked why a real obligation cannot confer a negative right against the thing bound by it, the answer is plain: as an inanimate thing is in the nature of things incapable of acting, it is impossible that a real obligation should ever consist in doing (*faciendo*); and, though it is possible that such an obligation should consist in not doing (*non faciendo*), yet an obligation not to do what the obligor by no possibility can do, is absurd and unmeaning, and therefore, in legal contemplation, cannot exist. In what, then, does a real obligation consist? Here again the answer is plain: it consists in permitting or suffering something to be done (*patiendo*).

But, though it seems so clear upon principle that there is no such thing as a negative real obligation, yet it is far less clear upon authority; for the Civilians all say there is such a thing, and, in so saying, they are supported, to some extent, by texts of the Roman law. Thus, in Justinian's Institutes,[1] it is said there is a

[1] *L.* 2, *Tit.* 3, s. 4.

servitude, that one shall not build his house higher, lest he obstruct his neighbor's lights (*ut ne altius tollat quis ædes suas, ne luminibus vicini officiatur*). Upon this passage, however, it may be remarked, first, that what it actually expresses is a personal obligation binding the owner of the house, — not a real obligation binding the house itself; secondly, that one is tempted to say that the passage is only an inaccurate mode of stating an affirmative servitude, namely, that the servient tenement is bound to permit the light to pass over it without obstruction to the windows of the dominant tenement.

If it be asked why a duty may not be negative, as well as a personal obligation, the answer is that a person can deprive himself of the right to do a thing only by conferring upon some one else the right not to have it done, — which he can do only by incurring a negative personal obligation in favor of the latter; but when the State wishes to deprive a person of the right to do a thing, it has a much more direct and simple (and therefore a better) way of accomplishing its object than by imposing upon him a duty not to do it, — namely, by commanding him not to do it, and so making the doing of it an affirmative tort; and, as the State is never supposed to do a vain and nugatory act, nor to do circuitously what it can do directly, it follows that the State can never be supposed to impose a negative duty.

*C. C. Langdell.*

[To be continued.]